IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 179 of 1992.

Judgement reserved on: 14.6.2007.

Date of decision: 12.7.2007.

Parkash Chand & ors. ….. **Appellants.**

Vs.

Smt. Bohlu Devi & ors. …. **Respondents.**

Coram

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?[1]

For the Appellants : **Mr. R.K.Bawa, Sr. Advocate with Mr. P.C.Sharma and Mr. Inderjit Narwal, Advocates.**

For the Respondents : **Mr. Ajay Chandel, Advocate, for respondents No. 1 (a) to 1(f) and respondents No. 2 and 3.**

Kuldip Singh, Judge.

The defendants are in appeal against the judgement, decree dated 1.2.1992, passed by learned District Judge, Mandi, Kullu and Lauhal-Spiti, Districts at Mandi in Civil Appeal No. 124 of 1991 (1980), confirming the judgement and decree dated 31.5.1980, passed by learned Sub Judge Ist Class, Sarkaghat, District Mandi in Civil Suit No. 18 of 1974.

2. The facts in brief are that plaintiffs Lal Singh, Ghunghar Singh and Sher Singh filed a suit against Wazira s/o Vikram, Sohan

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Whether the reporters of the local papers may be allowed to see the Judgment?

Singh, Rup Chand, Bhag Singh sons of Ganu, for possession of two sets of properties mentioned below:-

A. Land measuring 0-58-17 Hectare bearing khasra Nos. 569, 684, 756, 959, 940, 928, 843, 825, 794, 726, 715, 475 and 432 entered against Khewat No. 22 khatauni No. 71 in the Misal Haqiat prepared during the latest settlement which took place in the year 1968;

B. Land measuring 0-22-32 Hectare bearing khasra No. 537, 565, 642 and 664 entered against khewat No. 21 khatauni No. 69, situate in village Jandharu Khurad, illaqua Suranga, Tehsil Sarkaghat, District Mandi, H.P.

3. It has been alleged that Tawarsu was the owner of above described land. He had two wives, namely Maina and Gorju but no issues. On his death, his two wives named above, inherited his estate, as limited owners but above land was in Hissadari possession of Maina, who made illegal gift of property in favour of her pichhlag son (son from previous husband) Wazira, defendant No.1 of land described at (A) above and mutation No. 86 to this effect was decided on 27.5.1949. This gift was assailed by the plaintiffs and the suit was decreed in favour of plaintiffs and against Maina as well as Wazira and the gift was set-aside by the learned Sub Judge on 19.9.1951 and appeal was dismissed on 29.12.1951.

4. The land mentioned at “B” was also transferred by Maina in favour of Wazira and thus Wazira came in possession of entire land mentioned at “A” and “B”. Maina died on 5.4.1970. She was not in possession of the land in dispute at the time of her death. Wazira on 10.9.1970 had sold land comprised in khasra Nos. 684, 843,

measuring 0-10-95 Hectares to defendants Sohan Singh, Rup Chand and Bhag Singh. The sale is illegal and not binding on plaintiffs.

5. The plaintiffs No. 1 and 2 to the extent of half share and plaintiff No.3 to the extent of remaining half share are owners of land mentioned at "A" and "B" after the death of Maina being the reversioners of the estate of Tawarsu and as per decree, dated 19.9.1951.

6. The defendant No. 1 Wazira and defendants No. 2 to 4 filed two separate sets of written statements, but took almost similar defence. They alleged that plaintiffs had no locus standi to file the suit as Ganu, real brother of the deceased Tawarsu, who is father of defendants No. 2 to 4, was alive and he being the near reversioner of Tawarsu alone had the right to seek possession of the suit property. They alleged that plaintiff had no enforceable cause of action. On merits, they have pleaded that defendants No. 2 to 4 being the sons of Ganu were the near reversioners of late Tawarsu compared to plaintiffs. They, however, admitted that Maina had made a gift of the property mentioned at (A) above in favour of defendant No. 1 (Wazira), which was challenged by filing a suit and the civil court decreed the suit and declared that gift would be inoperative after the death of Maina. They have denied that property mentioned at (B) above was also gifted by Maina to defendant No.1 in the year 1950. They, however, admitted that defendant No. 1 had sold a part of the property mentioned at (A) above to defendants No. 2 to 4, but have taken the plea that they being the near reversioners compared to plaintiffs had the right to remain in possession of the sold land.

7. The trial court held that plaintiffs are entitled to take possession of property mentioned (A) above, but suit of the plaintiffs qua land mentioned in (B) above was dismissed on 31.5.1980. Plaintiffs filed Civil Appeal No. 123 of 1991 (1980), against the judgement and decree dated 31.5.1980 to the extent the suit was dismissed. The defendants filed Civil Appeal No. 124 of 1991 (1980), against judgement and decree dated 31.5.1980, to the extent the suit was decreed. Both these appeals were dismissed by District Judge by common judgement dated 1.2.1992. The defendants have filed this appeal against impugned judgement and decree. The appeal was dismissed by a learned Single Judge of this Court on 15.10.1996, but Hon'ble Supreme court in Civil Appeal No. 1673 of 1999, has set-aside the judgement dated 15.10.1996 and remitted the appeal back to this court for disposal afresh in accordance with law.

8. The appeal has been admitted on following substantial questions of law:-

1. Whether the learned appellate court below is right in law in deciding the issue of res-judicata against the appellants in the absence of any definite finding with regard to the competency of a court which decided the matter earlier?

2. Whether the Revenue Assistant of erstwhile Mandi State had the jurisdiction to adjudicate upon the status of a person?

3. Whether the learned appellate court below is right in law in ignoring the documentary evidence Ex. P 13, copy of the Parivar register, particularly, in view of the

fact when there are contradictory pedigree tables with regard to the status of the same person?

4. Whether the court below is right in law in not taking into consideration the statements made by the persons, who are dead and had made the statements more than 30 years back to the institution of the suit?

9. I have heard the learned counsel for the parties and have also gone through the record. Ex. P 13 mentioned in substantial question of law No. 3 is mutation and copy of Parivar register is Ex. DA.

10. The learned Senior counsel appearing on behalf of the appellants- defendants has submitted that the District Judge without any plea of plaintiffs and issue of res-judicata has wrongly applied the principle of res-judicata on the basis of Ex. P-12, order dated 28.5.1915. He has relied **V. Rajeshwari (Smt)** vs. **T.C. Saravanabava,** [2004 (1) SCC 551] in support of his submission that principle of res-judicata has been wrongly applied. The Revenue Assistant of erstwhile Mandi State had no jurisdiction to adjudicate upon the status of the person. The lower appellate court had ignored Ex. DA, which proves that Ganu was the son of Raghu. The lower appellate court has not taken into consideration the statements of persons who were dead and made those statements more than 30 years back prior to the institution of the suit. Ganu was the real brother of Tawarsu. Both of whom were sons of Raghu. The original defendants No. 2 to 4, were near reversioners of Tawarsu in comparison to plaintiffs with respect to property left by Tawarsu and

his widow Maina. The learned counsel for the plaintiffs- respondents has supported the impugned judgement and decree. The plaintiffs have not filed any appeal against the impugned judgement and decree to the extent it is against them.

Substantial Questions of law No. 1 to 4:

11. The substantial questions of law No. 1 to 4, are being disposed of collectively, as they are interconnected.

12. It has been submitted by the learned Senior Counsel appearing on behalf of the defendants- appellants that lower appellate court has erred in holding that paternity of Ganu was already decided, vide order dated 28.5.1915 Ex. P-12. He has submitted that in Ex. P-12, it is not clear what was the dispute and for applying the principle of res-judicata the point in issue in the earlier and later suits must be same and such issue must have been decided in earlier suit. The pleadings of the earlier case out of which order Ex. P-12 has arisen were not placed on record and therefore, the lower appellate court has wrongly held that decision, dated 28.5.1915, Ex. P-12, is res-judicata in the present controversy. In Ex. DA, copy of Parivar register Ganu has been shown as son of Raghu. In compromise Ex. DW 7/A dated 6.5.1952, in a suit between Ganu and Maina, Ganu has been shown son of Raghu. In pedigree table Ex. DW 7/B Ganu has been shown son of Raghu and brother of Tawarsu. In pedigree table Ex. P-14 Ganu has been shown son of Ragho. Some witnesses have deposed that Ganu was the son of Raghu and brother of Tawarsu. According to the defendants, there is overwhelming evidence on record to show that original defendants

No. 2 to 4 were near reversioners of Tawarsu in comparison to plaintiffs.

13. The learned counsel for the plaintiffs- respondents has submitted that Ganu was not son of Raghu. He was son of Ragho. The defendants are trying to create confusion. The paternity of Ganu has been proved on record by overwhelming documentary evidence, such as Ex. P-15 pedigree table where Ganu has been shown son of Rodha. The pedigree table Ex. P-14 on its face is wrong and it does not depict true picture. As per the case of the defendants, Ganu was the real brother of Tawarsu and both of them were the sons of Raghu. But in Ex. P-14, Tawarsu as son of Raghu has not been shown and it has been shown that Raghu was having only one son namely Ganu. In pedigree table Ex. P-9 Ragho has been shown having one son only, namely Tawarsu and name of Ganu as son of Raghu has not been mentioned. In pedigree table Ex. PW 6/A again Tawarsu son of Raghu has been shown and name of Ganu as son of Raghu has not been mentioned.

14. In Ex. P-12 order, dated 28.5.1915 Ganu was not held to be the son of Raghu. In pedigree table Ex. DW 7/B, there is a note that vide order, dated 20.5.1915, name of Ganu from the pedigree table was ordered to be struck off. The Parivar register from which extract Ex. DA was prepared must have been prepared after Panchayati Raj Institutions were established in the State. The basis on which Ganu has been shown son of Raghu in Parivar regiser Ex. DA have not been proved. The pedigree table Ex. P-9 and Ex. PW 6/A prove that Raghu had only one son Tawarsu. Ex. P-12, order

dated 28.5.1915 establishes that Ganu was not son of Raghu. Maina vide Ex. DW7/A admitted the claim of Ganu in a suit filed by Ganu and therefore, it is not binding on the plaintiffs. Some of the witnesses, no doubt, have stated that Ganu was son of Raghu, but they have not disclosed the basis of their deposition that Ganu was son of Raghu. Bhag Singh the original defendant No. 4, appeared as DW 6 and in his statement he has nowhere stated that Ganu was son of Raghu and brother of Tawarsu. It has come on record that at the time of recording of the evidence Ganu was alive. But surprisingly the original defendants No. 2 to 4, who are the sons of Ganu and are claiming that Ganu was son of Raghu did not produce him as witness in support of their case. Therefore, adverse inference is to be drawn against the defendants for not producing Ganu the most material witness regarding the fact whether Ganu was son of Raghu or not.

15. Even if submission of learned Senior counsel for the defendants- appellants is accepted that order Ex. P-12 dated 28.5.1915 is not sufficient for invoking the principle of res- judicata but Ex. P-12 still can be used as a piece of evidence alongwith other oral and documentary evidence on record to show that Ganu was not son of Raghu. Order dated 28.5.1915 Ex. P-12 is admissible and can be looked into in evidence. The reversionary rights of the plaintiffs were already established, vide Ex. P-10, judgement dated 19.9.1951 and appellate judgement, dated 29.12.1951 Ex. P-11.

16. The learned Senior Counsel for the appellants-defendants has failed to point out which statements of the persons who were dead and made 30 years ago, were not considered. The

defendants- appellants have failed to make out any case for interference. The substantial questions of law No. 1 to 4, are answered against the defendants- appellants.

17. No other point was urged.

18. In view of above discussion, the appeal is dismissed, with no orders as to costs.

July 12, 2007. **(Kuldip Singh)**
(*Hem*) **Judge.**